Filed 12/28/18 P. v. Dockins CA1/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ELIZABETH ANNE DOCKINS, Defendant and Appellant.	A153256 (Mendocino County Super. Ct. No. SCUK-CRCR-17-89091)

This is an appeal from an order by the trial court to pay victim restitution in the amount of $567 to cover cash taken from the victim's wallet. Defendant Elizabeth Anne Dockins, who pleaded no contest to the felony grand theft, contends this sum cannot, as a legal matter, be recovered by the victim because it was not alleged to have been stolen in the charging document. For reasons that follow, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On February 16, 2017, a criminal complaint was filed in case No. SCUK-CRCR-17-89091, charging defendant with one count of felony grand theft (Pen. Code, § 487)[1] and alleging two prison priors within the meaning of section 667.5, subdivision (b).

According to a contemporaneous police report and October 12, 2017 letter from defense counsel to the court, on February 1, 2017, at about 10:42 a.m., Nelson told Ukiah Police Officer Mason someone had used his debit and/or credit cards without permission

[1] Unless otherwise stated, all statutory citations herein are to the Penal Code.

the previous weekend at several local businesses. Nelson's bank, U.S. Bank, confirmed seven fraudulent transactions had been made on his account. A bank representative advised Nelson that his card would be deactivated and his account reimbursed for the fraudulent transactions.

On February 7, 2017, Nelson reported additional fraudulent transactions on his debit and/or credit cards to Officer Mason. Officer Mason thereafter sought video surveillance from Safeway, one of the locations of the fraudulent transactions. Officer Mason subsequently arrested defendant, who was found in possession of Nelson's debit and/or credit cards.

On February 21, 2017, defendant pleaded no contest to the felony grand theft count and admitted one of the prison prior allegations. Pursuant to this negotiated disposition, the trial court then dismissed the remaining prison prior allegation and indicated defendant could be sentenced to a three-year term in local prison.

On May 17, 2017, a criminal information was filed in case No. SCUK-CRCR-17-89666, charging defendant with failure to appear (§ 1320.5) and alleging an on-bail enhancement (§ 12022.1). Judicially noticed court records indicated defendant had failed to appear for sentencing on March 21, 2017, after being released on bail on March 17, 2017.

On July 18, 2017, defendant pleaded no contest to the failure-to-appear count. Pursuant to the negotiated disposition, the trial court then dismissed the on-bail allegation and imposed a consecutive eight-month local prison term.

On August 15, 2017, the trial court sentenced defendant to a three-year term in local prison for the felony grand theft offense.

On December 14, 2017, following a contested hearing, the trial court ordered defendant to pay victim restitution in the amount of $4,017, which included $3,450 for Nelson's lost wages and $567 for cash taken from his wallet during the theft. This timely appeal of the trial court's restitution order followed.

DISCUSSION

The sole issue on appeal is whether the trial court's restitution order requiring payment to Nelson of the sum of $567 to cover the cash taken from his wallet is valid. The legal framework governing our review of this issue is not disputed.

"It is the unequivocal intention of the People of the State of California that all persons who suffer losses as a result of criminal activity shall have the right to seek and secure restitution from the persons convicted of the crimes causing the losses they suffer." (Cal. Const., art. I, § 28, subd. (b)(13)(A).) "Restitution shall be ordered from the convicted wrongdoer in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss." (*Id.*, subd. (b)(13)(B).)

In accordance with this constitutional mandate, section 1202.4 was enacted, and provides in relevant part: "[I]n every case in which a victim has suffered economic loss as a result of the defendant's conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court." (§ 1202.4, subd. (f).) Further, restitution under this provision "shall be of a dollar amount that is sufficient to fully reimburse the victim or victims for every determined economic loss incurred as the result of the defendant's criminal conduct," including, but not limited to, the victim's lost wages or profits and relocation expenses incurred to move away from the defendant. (§ 1202.4, subd. (f)(3).) "The value of stolen or damaged property shall be the replacement cost of like property, or the actual cost of repairing the property when repair is possible." (§ 1202.4, subd. (f)(3)(A).)

"A restitution order is reviewed for abuse of discretion and will not be reversed unless it is arbitrary or capricious. [Citation.] No abuse of discretion will be found where there is a rational and factual basis for the amount of restitution ordered. ' "[T]he standard of proof at a restitution hearing is by a preponderance of the evidence, not proof beyond a reasonable doubt." ' [Citation.]" (*People v. Gemelli* (2008) 161 Cal.App.4th 1539, 1542–1543.)

According to defendant, the trial court's restitution order violated section 1202.4, which " 'limits the scope of victim restitution to those losses which were caused by the criminal conduct for which the defendant was convicted' " in cases, like hers, where the trial court imposes a prison term rather than probation.[2] (*People v. Woods* (2008) 161 Cal.App.4th 1045, 1049–1050; accord, *People v. Lai* (2006) 138 Cal.App.4th 1227, 1246.) She reasons that the charging document specified only the sum of $1,861.84 as being the amount unlawfully taken, which represented the fraudulent charges on Nelson's debit and/or credit cards. It was not until after the negotiated disposition that it was revealed $567 in cash was taken and, undisputedly, Nelson did not report this cash loss when he reported his theft to the Ukiah Police Department. The People, in turn, respond that the $567 sum "was undoubtedly caused by the criminal conduct for which appellant was convicted," given that it was part of the property unlawfully stolen by defendant for which she was charged with felony grand theft even if it was not initially reported by the victim as such. To determine which position is correct, we first turn to our record.

The prosecutor charged defendant with "*the crime of GRAND THEFT, a FELONY violation of section 487(a) of the California Penal Code, in that said defendant did willfully and unlawfully take money and personal property of a value exceeding Nine Hundred Fifty Dollars ($950), to wit, $1,861.84, the property of David Nelson and US Bank.*" (Italics added.) This amount, as mentioned, was based on the unauthorized transactions on Nelson's debit and/or credit cards.

When defendant thereafter pleaded no contest to felony grand theft, the trial court notified her that restitution would be a consequence of her plea, meaning she "would

---

[2] There is an exception to this rule when the defendant makes a so-called *Harvey* waiver, which allows the court to rely on the facts underlying a criminal charge that was dismissed as part of a negotiated disposition to impose an adverse sentencing consequence (like restitution). (See *People v. Harvey* (1979) 25 Cal.3d 754; accord, § 1192.3, subd. (b) ["If restitution is imposed which is attributable to a count dismissed pursuant to a plea bargain, as described in this section, the court shall obtain a waiver pursuant to *People v. Harvey* (1979) 25 Cal.3d 754 from the defendant as to the dismissed count"].) Here, it is undisputed there was no such waiver.

have to pay money to anyone that was damaged economically as a result of [her] conduct in this case." The trial court did not, however, indicate any particular amount of restitution. Defendant responded, "Yeah." The parties then stipulated to the fact that "[o]n February 1st, 2017, in the County of Mendocino, the defendant . . . took possession, unlawfully, of property belonging to David N. in the amount of $1,800, which constituted count 1," and the matter was continued.

In anticipation of sentencing, Nelson filed a declaration stating that he was seeking $567 in victim restitution for cash that defendant took from his wallet, as well as $3,460 in lost wages. Counsel for both parties argued as to the propriety of including this $567 cash sum in the court's victim restitution award.

The trial court thereafter held an evidentiary hearing, where Nelson testified that, after realizing his wallet was stolen, he went to the sheriff's department in January 2017 to report a missing weapons permit in his name, a wallet and over $500 in cash. Nelson further testified that, on February 1, 2017, his secretary informed him several unauthorized transactions had been made on his debit and/or credit cards, a fact confirmed less than an hour later when a representative of U.S. Bank contacted him about suspicious charges. Nelson then went to the Ukiah Police Department to report that his debit and/or credit cards were being used without his permission and, during his visit, gave Officer Mason a list of unauthorized charges without mentioning the $567 in cash. A week later, on February 7, Nelson reported to Officer Mason that additional unauthorized charges were made on his cards and gave him a list of the charges, totaling over $1,800, from his U.S. Bank statements. Again, Nelson acknowledged, he neglected to mention his stolen wallet or cash to Officer Mason.

On cross-examination, Nelson acknowledged his bank reimbursed him for the $1.861.84 in unauthorized charges. In addition, Nelson explained that he first reported the theft (including the cash) to the Mendocino County Sheriff's Department because he lived outside Ukiah's city limits, but then later went to the Ukiah Police Department because his bank (U.S. Bank) was located there. Nelson then confirmed on the stand that both his debit and/or credit cards and over $500 in cash were in his wallet when it was

stolen. Nelson also testified that he reported the over $500 in cash as stolen when he spoke to Jessica at the Victim Witness Program in March 2017. He also reported that he had suffered $3,460 in monetary losses as a result of taking time off from work seven times to appear in the case.

The parties stipulated that the Ukiah Police Department reports contain no information about the theft of Nelson's $567 in cash.

Following this hearing, the trial court accepted Nelson's testimony as credible, and rejected defense counsel's argument that the $567 taken from his wallet could not be attributed to defendant's criminal conduct and therefore was not an authorized component of restitution. In the court's subsequent written order, it concluded: "The defendant plead[ed] guilty to theft of personal property belonging to David Nelson. While there were efforts to impeach the witness with questions concerning why the police reports did not reflect the cash taken, they were unavailing. The defendant's conviction was for taking money and personal property exceeding $950.00 of David Nelson (see complaint). The fact that more was taken than originally thought does not undermine the validity of the restitution claims nor does it necessitate a Harvey Waiver."

We accept the trial court's judgment, which is firmly grounded in the law, as well as the factual record. (*People v. Gemelli*, *supra*, 161 Cal.App.4th at p. 1542 ["No abuse of discretion will be found where there is a rational and factual basis for the amount of restitution ordered"].) Initially, we agree with the trial court as a legal matter that defendant's taking of cash *in addition to* her unauthorized use of Nelson's debit and/or credit cards were part of the same criminal conduct for which she was charged and thereafter pleaded no contest. The charging document makes clear that defendant was accused of taking money and personal property belonging to Nelson "exceeding $950.00," notwithstanding the fact this document identified only $1,861.84 as the amount taken. As such, no *Harvey* waiver was required for the trial court to consider facts relating to the additional sum of cash taken from Nelson's wallet. (See *People v. Harvey*, *supra*, 25 Cal.3d at p. 758 [recognizing the general authority of a sentencing court to take into account facts underlying a charge dismissed pursuant to a plea bargain where "those

facts [are] also *transactionally related* to the offense to which defendant pleaded guilty"].)

Further, as a factual matter, once a victim, like Nelson, makes a prima facie showing of economic losses incurred as a result of the defendant's criminal acts, the burden shifts to the defendant to disprove the amount of losses claimed by the victim. (*People v. Gemelli*, *supra*, 161 Cal.App.4th at pp. 1542–1543.) Nelson made this prima facie showing at the hearing, testifying under oath that $567 in cash was taken from his wallet. (*People v. Millard* (2009) 175 Cal.App.4th 7, 26 ["a prima facie case for restitution is made by the People based in part on a victim's testimony on, *or other claim or statement of*, the amount of his or her economic loss"].) As the trial court subsequently noted in its written order, defense counsel's efforts to impeach his testimony failed. We defer to the court's credibility finding, given that the trial judge, unlike this court, was actually present to assess Nelson's testimony. (*People v. Baker* (2005) 126 Cal.App.4th 463, 468–469 [reviewing court will not second-guess an inference drawn by the fact finder so long as there is substantial evidence to support it].)

Accordingly, under these circumstances, the proper course of action is to affirm the trial court's judgment, as defendant has failed her burden to disprove Nelson's prima facie showing of economic loss as a result of her crime. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 [on appeal, the reviewing court presumes the trial court's judgment or order is correct, and " '[a]ll intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown' "].)

DISPOSITION

The judgment is affirmed.

_____
Jenkins, J.

We concur:

_____
Siggins, P. J.

_____
Fujisaki, J.